



August 31, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Wireless Telecommunications Bureau
445 12th Street, SW
Washington, D.C. 20554

Re: WT Dockets 07-16, 07-30 Written Ex Parte Submission

M2Z Networks, Inc. (“M2Z”) submits this *ex parte* to highlight the Commission’s obligations under Section 7 and 10 of the Communications Act to make a public interest determination regarding the highest and best use of the 2155-2175 MHz band. In light of these statutory obligations, the Commission should decide that Nationwide Broadband Radio Service (“NBR”) is the highest and best use of the band. If it defers consideration of the appropriate method for assigning the 2155-2175 MHz band, however, it must prevent incumbents from accessing the spectrum.

Section 7 requires the Commission to make a public interest determination on M2Z’s application quickly by imposing the burden of proof on the parties that oppose M2Z’s application.¹ In addition, M2Z’s Forbearance Petition asks the Commission, consistent with Section 10, to forbear from any Commission rule, provision of the Act or Commission policy “to the extent such rules, statutory provisions, or policies impede the acceptance and grant of the Application.”² Working together, these statutory provisions, along with the 2003 *AWS Third NPRM* in which the Commission sought specific

¹ See 47 U.S.C. § 157.

² See Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(a) and (c) of the Commission’s Rules and Other Regulatory and Statutory Provisions, WT Docket No. 07-30, at 1 (filed Sept. 1, 2006) (“M2Z Forbearance Petition”).

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comment on the highest and best use of the 2155-2175 MHz band,³ provide ample basis for a public interest decision designating the 2155-2175 MHz band for NBRS and establishing the service rules that have been supported by the massive record in these dockets.

In essence, M2Z, through its license application and Forbearance Petition, has asked that the Commission (1) make a decision on the highest and best use of the spectrum and (2) immediately assign the spectrum to M2Z. Thus, the Commission has two choices. It can either grant the spectrum as requested by M2Z or, pursuant to its Section 7 authority, make a public interest determination concerning the first element of M2Z's requests (as no other party has successfully rebutted M2Z's showing that NBRS is the highest and best use of this spectrum band⁴). To the extent any policies rules or statutory provisions impede this determination, the Commission should also forbear from such policies rules or statutory provisions, consistent with Section 10 of the Communications Act. Once it makes the public interest determination that NBRS is the highest and best use of the 2155-2175 MHz band, the Commission can address the appropriate assignment mechanism in a separate Notice of Proposed Rulemaking that would be resolved during the 90-day window provided under Section 10(c) of the Communications Act. Given the record in this proceeding, however, any auction for the 2155-2175 MHz band must be limited strictly to new entrants.

As M2Z has set forth in the record, auctioning off the 2155-2175 MHz band to an incumbent wireless carrier would not satisfy Congress' mandate in Section 309(j)(3)(B) to avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants.⁵ Moreover, as explained by Dr. Simon Wilkie in this proceeding, incumbent wireless carriers have a troubling track record relating to the warehousing of

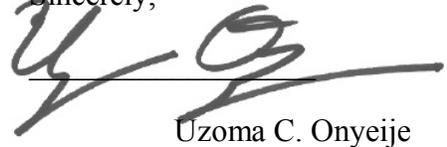
³ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order, 18 FCC Rcd 2223, ¶¶ 62, 70 (2003).

⁴ See, e.g., M2Z Networks, Inc. *Ex Parte* Response to Replies and Oppositions, WT Docket Nos. 07-16 & 07-30, at 18-23 (filed Apr. 16, 2007); See also Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny, WT Docket Nos. 07-16 and 07-30, at 10-25 (filed Mar. 26, 2007) ("M2Z Opposition")

⁵ See M2Z Opposition at 48-53; 47 U.S.C. § 309(j)(3)(B).

spectrum.⁶ If the Commission were to assign the 2155-2175 MHz band in an auction that was open to incumbents, there is a significant chance that large incumbent wireless and broadband providers would try to obtain the license primarily to keep new entrants out of the market.⁷ By restricting eligibility in the 2155-2175 MHz band, therefore, the Commission can promote the entry of a new, nationwide facilities-based wireless broadband competitor.⁸

Sincerely,

A handwritten signature in black ink, appearing to read 'Uzoma C. Onyeije', written over a horizontal line.

Uzoma C. Onyeije

cc: Erika Olsen
Bruce Gottlieb
Renee Crittendon
Wayne Leighton
Angela Giancarlo

⁶ See Simon Wilkie, PhD., “*Spectrum Auctions Are Not a Panacea: Theory And Evidence Of Anti-Competitive and Rentseeking Behavior in FCC Rulemakings and Auction Designs*,” WT Docket Nos. 07-16 & 07-30, at 13-19, 39 (filed Mar. 26, 2007) (“*Wilkie Auctions Study*”); see also M2Z Opposition at 50-51 (describing apparent warehousing activities in the WCS, LMDS, MVDDS, and BRS/EBS bands).

⁷ See M2Z Opposition at 51-52. Dr. Wilkie and M2Z have also explained how incumbents can use the auction process to prevent potential new entrants from acquiring spectrum resources. See *Wilkie Auctions Study* at 13-19, 39; see also M2Z Opposition at 49-51.

⁸ See, e.g., M2Z Opposition at 102-03 (noting that granting a nationwide license in the 2155-2175 MHz band to M2Z would spur competition in the wireless broadband market).